UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THARALDSON FINANCIAL GROUP, INC.; IRONSHORE SPECIALTY INSURANCE COMPANY; and INDUSTRIAL RISK INSURERS, Plaintiffs, vs. AAF McQUAY INC. dba McQUAY INTERNATIONAL, a Minnesota corporation; and DOES 1 through 40, inclusive, Defendants.	Case No.: 2:13-cv-01861-GMN-GWF **ORDER**

Pending before the Court is the Motion for Judgment on the Pleadings (ECF No. 7) filed by Defendant Daikin Applied Americas Inc. f/k/a AAF-McQuay ("McQuay") on October 15, 2013. Plaintiffs Tharaldson Financial Group, Inc. ("Tharaldson"), Ironshore Specialty Insurance Company ("Ironshore"), and Industrial Risk Insurers ("Industrial") (collectively "Plaintiffs") filed their Response in Opposition (ECF No. 13) on October 31, 2014, and McQuay filed its Reply (ECF No. 15) on November 11, 2013.

I. BACKGROUND

Plaintiffs initially filed the current action in Nevada state court on August 9, 2013. (Complaint, ECF No. 1-1). According to the Complaint, a fire occurred on or about August 11, 2010 at a property located at 5735 Dean Martin Drive, Las Vegas, Nevada (the "Property"). (*Id.* ¶ 1). The fire was caused by the failing of the heating ventilation and cooling ("HVAC") unit located at the Property, which was manufactured and sold by McQuay and the unnamed defendants. (*Id.* ¶¶ 10–11). The Property, which was at all relevant times managed and operated by Tharaldson and was insured by Ironshore and Industrial (the "Insurers"), suffered

damages in excess of $10,000 as a result of the fire. (*Id.* ¶¶ 1, 9). These damages were subsequently paid out to Tharaldson by Ironshore and Industrial under their applicable insurance policies, which led to the legal and equitable subrogation of Tharaldson's rights to the Insurers. (*Id.* ¶ 8).

Plaintiffs Complaint asserts three causes of action against McQuay for (1) strict products liability, (2) negligence, and (3) breach of implied warranty. (*Id.* ¶¶ 14–23). McQuay subsequently removed the action to federal court (ECF No. 1) on October 11, 2013 and filed the current pending Motion for Judgment on the Pleadings (ECF No. 7).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(c) provides that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." "Judgment on the pleadings is properly granted when, accepting all factual allegations in the complaint as true, there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012). Accordingly, "[a]nalysis under Rule 12(c) is substantially identical to analysis under Rule 12(b)(6) because, under both rules, a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy." *Id.*

In order to survive a motion to dismiss under Rule 12(b)(6), a complaint must allege "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

The Court, however, is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a

violation is *plausible*, not just possible. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555) (emphasis added).

III. DISCUSSION

In its motion, McQuay asserts that Plaintiffs' claims for strict products liability and negligence are barred by the economic loss doctrine and that Plaintiffs' claim for breach of implied warranty is barred by a contractual disclaimer. (Mot. for Judgment 6:1-10:10, ECF No. 7). McQuay further argues that even if it is not entitled to judgment on the pleadings for all of Plaintiffs' claims, Plaintiffs' damages for those claims are still limited by an express contractual disclaimer. (*Id.* 10:11-11:25).

A. Economic Loss Doctrine

The Supreme Court of Nevada has explained that "the economic loss doctrine marks the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby generally encourages citizens to avoid causing physical harm to others." *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 206 P.3d 81, 86 (Nev. 2009). To accomplish this purpose, "the doctrine bars unintentional tort actions when the plaintiff seeks to recover purely economic losses." *Id.* (internal quotations omitted). Accordingly, "a plaintiff may not recover economic loss under theories of strict products liability or negligence." *Calloway v. City of Reno*, 993 P.2d 1259, 1264 (Nev. 2000) *overruled on other grounds by Olson v. Richard*, 89 P.3d 31, 33 (Nev. 2004) (finding that the economic loss doctrine does not bar recovery for negligence claims brought under Nevada Revised Statutes Chapter 40). Moreover, when an integrated component of a product, such as a building's heating or plumbing system, fails and causes damage to the larger product but not to other property, only economic loss has occurred. *Id.* at 1268–69; *see also* (*Fireman's Fund Ins. Co. v. Sloan Valve Co.*, 2:10-CV-01816-RLH, 2011 WL 5598324, at *2 (D. Nev. Nov. 16, 2011) ("In a case such as this, when an integral

component of a product (including a building) fails and damages the larger product, only economic loss occurs and, thus, tort recovery is barred.").

In their Complaint, Plaintiffs seek recovery of damages to the Property under theories of both strict products liability and negligence. (Complaint ¶ 11, ECF No. 1-1). Plaintiffs, argue that the economic loss doctrine does not apply to bar these claims because the HVAC unit—which Plaintiffs admit had been installed in the Property for over a year—was not an integral part of the Property, or at least whether the HVAC unit was an integrated part of the Property is a question of fact. (Resp. 5:1-7:13, ECF No. 13). The Court disagrees.

In *Calloway*, the Supreme Court of Nevada specifically held that "a building's heating and plumbing system [is a] necessary and integrated part[] of the greater whole…. Consequently, when a heating and plumbing system damages the building as a whole, the building has injured itself and only economic losses have occurred." *Calloway*, 993 P.2d at 1268; *see also Sloan Valve Co.*, 2:10-CV-01816-RLH, 2011 WL 5598324, at *3 (D. Nev. Nov. 16, 2011) (finding on summary judgment that a toilet flush valve was an integrated and integral part of a building). Therefore, while it may be a question of fact whether some products installed in buildings retain their separate identity as products, in Nevada, an installed HVAC unit is an integrated and integral part of the building, and damage to the Property caused by the HVAC is purely economic loss.

However, in the Complaint and in their Response, Plaintiffs not only assert damages to the Property, but they also assert damages to other personal property. (Complaint ¶ 11, ECF No. 1-1; *see also* Resp. 7:2-4, ECF No. 13). Damage to other property beyond the building in which the HVAC unit was an integrated part is not a purely economic loss. *See Calloway*, 993 P.2d 1259, 1263 ("Purely economic loss is generally defined as the loss of the benefit of the user's bargain ... including ... pecuniary damage for inadequate value, the cost of repair and replacement of the defective product, or consequent loss of profits, *without any claim of*

personal injury or damage to other property.") (emphasis added) (internal quotations omitted). Therefore, because Plaintiffs have alleged damage to "other property," the economic loss doctrine does not apply at this stage in the litigation and tort recovery may still be permitted for all of Plaintiffs' alleged damages. *See id.*; *Peri & Sons Farms, Inc. v. Jain Irr., Inc.*, 933 F. Supp. 2d 1279, 1286 (D. Nev. 2013) ("even though 'purely economic losses' are not recoverable in strict products liability or negligence, when a defective product causes personal injury or damage to 'other property,' the economic loss doctrine does not apply and tort recovery may be permitted.); *see also* Restatement (Third) of Torts: Prod. Liab. § 21 cmt. e (1998) ("The characterization of a claim as harm to other property may trigger liability not only for the harm to physical property but also for incidental economic loss. The extent to which incidental economic loss is recoverable in tort is governed by general principles of legal cause."). Accordingly, McQuay is not entitled to judgment on the pleadings for Plaintiffs' claims of strict product liability and negligence.

B. Breach of Implied Warranty & Limitation of Damages

McQuay's argument for judgment on the pleadings regarding Plaintiffs' claim for breach of implied warranty and a limitation of damages is based upon express disclaimers contained in a document entitled "Terms & Conditions of Sale (North America)" (the "Terms & Conditions") (ECF N0. 6-1), which McQuay attached to its Answer to Plaintiffs' Complaint. (Mot. for Judgment 8:20-10:10, ECF No. 7). This two-page document, however, is not signed by either party and, other than titling the document an "agreement" in its filings, McQuay has failed to attach documentation showing or even allege that the Terms & Conditions was received by Plaintiffs or formed an binding agreement between the parties.[1] Moreover, while

[1] In its Reply, McQuay attached a one-page document entitled "Final Rep Order Acknowledgement," which McQuay describes as a "signed 'Acknowledgement' letter for the Terms and Conditions." (Reply 7:2-3, ECF No. 15; Acknowledgement, ECF No. 15-1). This document, however, is on McQuay's letterhead and appears to be nothing more than an internal record of McQuay's indicating that the HVAC unit was ordered and shipped to Tharaldson, not an indication that Plaintiffs ever received or agreed to the Terms & Conditions.

they do not expressly deny the authenticity of the Terms & Conditions, in their Response, Plaintiffs contend that McQuay has failed to sufficiently allege that Plaintiffs agreed to the provision within the Terms & Conditions or even received the document. (Resp. 7:14-8:6, ECF No. 13).

"As a general matter, a district court may not consider any material outside of the pleadings when ruling on a Rule 12(b)(6) motion.[2] *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)." However, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Otherwise, if the district court considers materials outside of the pleadings, the motion to dismiss is converted into a motion for summary judgment. *See* Fed. R. Civ. P. 12(d); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

While the Terms & Conditions may create a valid and binding contract between the parties and Plaintiffs have not expressly disputed the authenticity of the document, McQuay has failed to sufficiently allege that the Terms & Conditions created a binding agreement and Plaintiffs have put the authenticity of the document in question. *See Garcia v. Fannie Mae*, 794 F. Supp. 2d 1155, 1164 (D. Or. 2011) ("[P]laintiff's failure to dispute the authenticity of the alternative Notices does not amount to their admission that the alternative Notices are

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(Acknowledgement, ECF No. 15-1). Moreover, because this document was in McQuay's Reply, Plaintiffs have not had an opportunity to refute its authenticity.

[2] Because "[a]nalysis under Rule 12(c) is substantially identical to analysis under Rule 12(b)(6)," the Court applies the same rules in determining what documents may be considered in ruling on the motion. *See Chavez*, 683 F.3d at 1108; *see also Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment.") (quoting an older version of Rule 12(c)).

authentic or that they were provided with complete copies of the alternative Notices at closing. Thus, one of the prerequisites to the court's consideration of the alternative Notices—i.e., that the authenticity of the documents not be contested—is absent here."). Accordingly, at this stage in the proceedings, the Court cannot take judicial notice of the Terms & Conditions or resolve the issue of whether it creates a binding contract that limits Plaintiffs' claims for relief. *See Newsom v. Countrywide Home Loans, Inc.*, 714 F. Supp. 2d 1000, 1009 (N.D. Cal. 2010) ("Plaintiffs takes exception to the authenticity of the documents presented by Countrywide, and dispute that they received copies of *completed* forms bearing their signature. As such, the Court cannot, in connection with the instant motion, resolve the question of whether Plaintiffs, in fact, were provided with the completed notices, as alleged by Countrywide."). "That determination is more appropriately made by way of a motion for summary judgment." *Id.* Therefore, McQuay's is not entitled to judgment on the pleadings dismissing Plaintiffs' claim for breach of implied warranty or limiting Plaintiffs' potential damages.

IV. CONCLUSION

IT IS HEREBY ORDERED that McQuay's Motion for Judgment on the Pleadings (ECF No. 7) is **DENIED**.

DATED this 30 day of September, 2014.

Gloria M. Navarro, Chief Judge
United States District Judge